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The Convergence of Law: the Finnish Limited Liability Companies Act as an Example of the So-Called "Americanization" of European Company Law

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Abstract

The convergence of law is a widely discussed and researched phenomenon. In company law the convergence problemacy has often been linked to the so-called Americanization of law which is understood as a phenomenon where foreign law is influenced by American (state or federal) law. Quite often this topic has been approached from a "macro" perspective which leaves some of the research findings somewhat abstract and general. Therefore, in this article, the Americanization of European company law has been analyzed utilizing a "micro" perspective. The purpose is to illustrate how and why European company law has been influenced by American corporate law by using the Finnish Limited Liability Companies Act as an example.

1 Introduction

The convergence of law is a multidimensional and widely researched phenomenon. There are many ways to define what the convergence of law means. For example, Andrei Y. Mordovcev, Tatyana V. Mordovceva and Aleksey Y. Mamychev have claimed that

> [t]he convergence of law is [a] polivector process of rapprochement and interpenetration of the individual components of different national legal systems on the basis of the global socio-cultural, political and economic factors, the universal legal principles and standards, as well as the specifics of their implementation in domestic legal relations, the result of which is the internationalization and harmonization of the legal regulation of public relations.[2]

[1] The author is the vice-dean of the Faculty of Law at the University of Helsinki. This article has been presented at the European Consortium for Political Research's General Conference held in Prague 7.–10.9.2016.

[2] Mordovcev, Andrei Y., Mordovceva, Tatyana V. & Mamychev, Aleksey Y.: The Convergence of Law: The Diversity of Discourses. *Mediterranean Journal of Social Sciences 2015* pp. 262–267, p. 266.

This is, of course, only one way to explain what the convergence of law is, and as Ugo Mattei and Luca G. Pes have demonstrated, convergence is such a complex phenomenon that it cannot be encapsulated by a single definition.[3] Moreover, the mechanisms of legal convergence are numerous.[4]

The convergence of law is a consequence of globalization.[5] As Hans-Ueli Vogt has aptly observed, the "characteristics of the globalization of the law facilitate and foster certain patterns of change, which, in turn, foster convergence."[6] Unlike its counterpart – divergence – the convergence of law is often perceived as positive international development,[7] although legal scholars sometimes "fall into the classic trap" of thinking that convergence is a value in and of itself.[8] From an economic perspective, the convergence of law may, of course, reduce transaction costs and facilitate international commerce, yet one should keep in mind that uniformity in law should never become an end in itself.[9]

In jurisprudence the convergence of law has been often analyzed as a transatlantic phenomenon, in which case legal scholars tend to use such concepts as the *Americanization* and *Europeanization* of law. Although transatlantic legal convergence is usually understood as European law becoming more American – or the other way around – the Americanization of law has sometimes been associated with the federalization of U.S. law and respectively the Europeanization of law with the shift of law-making authority from the Member States to the EU.[10] In other words, some legal scholars have approached the Americanization and Europeanization of law as an intra-American or intra-European subject. It is therefore necessary to clarify what one means when discussing the Americanization or Europeanization of law.

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[3] Mattei, Ugo & Pes, Luca G: Civil Law and Common Law: Toward convergence? In Celdeira, Gregory A., Keleman, R. Daniel &Whittington, Keith E. (eds.): *The Oxford Handbook of Law and Politics*. Oxford University Press 2008 pp. 267–280, pp. 268–271. See also Chirico, Filomena &Larouche, Pierre, who separate the convergence of law from harmonization and the unification of law. Chirico, Filomena &Larouche, Pierre. Convergence and Divergence, In Law and Economics and Comparative Law. In Larouche, Pierre & Cserne, Péter (eds.): *National Legal Systems and Globalization. New Role, Continuing Relevance*. TMC Asser Press / Springer 2013 pp. 9–33, p. 12.

[4] See, e.g., Vogt, Hans-Ueli: Convergence in Corporate Governance in Light of Globalization. A Presentation Given at the International Conference on Law and Society in the 21st Century, Berlin 2007 pp. 5–8.

[5] From a company law perspective, see, e.g., Gilson, Ronald J.: Globalizing corporate governance: convergence of form or function. In Gordon, Jeffrey N. & Roe, Mark J. (eds.): *Convergence and Persistence in Corporate Governance*. Cambridge University Press 2004 pp. 128–160, pp. 128–137 and Vogt 2007.

[66] Vogt 2007 p. 5.

[7] See, e.g., the *Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe* (2002, later "High Level Group 2002") p. 72–73.

[8] Chirico & Larouche 2013 p. 12 and 22.

[9] Funken, Katja: The Best of Both Worlds – The Trend Towards Convergence of the Civil Law and the Common Law System. Comparative Legal Essay 2003 (available at SSRN: http://ssrn.com/abstract=476461) p. 5.

[10] Bremann, George A.: Americanization and Europeanization of Law: Are There Cultural Aspects? *Sesquicentennial Essays of the Faculty of Columbia Law School 2008*.

In this article, the Americanization of law is understood as a phenomenon where foreign law (e.g. EU law) is influenced by American (state or federal) law.[11] This topic can be approached from a "macro" perspective (e.g., how the so-called Sarbanes-Oxley Act has influenced the 8th company law directive,[12] or how American contract law has affected the culture of contracting in Europe) as well as from a "micro" perspective (e.g., how the Delaware General Corporation Law – later "DGCL" – has influenced the national laws of the EU Member States). Of these two approaches, here I utilize the latter.

The purpose of this article is to illustrate how and why European company law has been influenced by American (U.S.) corporate law by using the Finnish Limited Liability Companies Act (624/2006, later the "FCA") as an example. The FCA is a good subject for analysis, since Americanization has been explicitly acknowledged in the preparatory materials of the law. In addition, Finnish company law specialists have paid relatively much attention to the issue of convergence, and they have actively participated in the discussion on the topic on both the national and international levels. Furthermore, the FCA is a relatively new and – by European standards – modern law: One can argue that it is a truly European company law.

Besides simply illustrating how and why the FCA became Americanized, some of the consequences – i.e., the pros and cons – of this convergence shall also be briefly assessed. Here, one can easily connect these consequences with several legal dilemmas which have received much attention in recent international company law scholarship. Unfortunately, these issues cannot be discussed in detail.

2 Americanization of the FCA

Nordic companies acts (meaning the Danish, Finnish, Norwegian and Swedish acts) have a common background, and before the 21st century they were substantially based on the so-called French-Germanic juridical tradition.[13] The first Finnish companies act dates back to 1895, and it was completely

[11] In modern-day company law scholarship, the question of whether U.S. law has been influenced by European law is usually ignored, while shareholder pressure and the power of the (Anglo-American) shareholder-oriented ideology have been predicted to force legal changes in the direction of Anglo-American company and securities law. See, e.g., Hansmann, Henry & Kraakman, Reiner: The End of History for Corporate Law. *Georgetown Law Journal* 2001 pp. 439–468, p. 455.

[12] Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents.

[13] In addition, Nordic companies acts have been subject to significant influence from the Anglo-Saxon tradition. Lekvall; Per (ed.): *The Nordic Corporate Governance Model*. SNS Förlag 2013 p. 38.

revised in 1978. The act of 1895 (Laki osakeyhtiöstä, 22/1895) was in many ways an imperfect law, and in the late 1910s it was already considered outdated by global standards.[14] The act of 1978 (Osakeyhtiölaki, 734/1978) was, in turn, a relatively modern and comprehensive law. It was prepared on a Nordic level, which meant that it shared many similarities with other "second generation" Nordic companies acts – although not as many as initially planned.[15] The act of 1978 was built on a strict state-interventionist model to secure the interests of the "welfareizing" nation, which meant that the actions and duties of Finnish companies, shareholders and directors were regulated carefully.

In 1997, as a consequence of joining the EU, the act of 1978 was updated to meet the standards of European company law. The implementation of EU law, however, fragmented and complicated Finnish company legislation, and consequently the need to reconsider the fundamentals and details of national law became inevitable. EU company law did not – and does not even today – form a comprehensive and consistent regulatory framework, which meant that Finnish legislators had rather wide discretion on the principles and casuistic provisions of the new companies act.[16] In addition, it is important to remember that EU company law directives mainly concern public and/or listed companies, while the FCA applies to all limited liability companies – i.e., public and listed companies as well as private companies – registered in accordance with Finnish law.[17]

The drafting of the new companies act began around the change of millennium, and right from the beginning it seemed quite obvious that the law was to be founded on the Anglo-American law and economics view of the company.[18] According to this perspective, the purpose of a company is to facilitate an economically efficient vehicle for business operations – i.e., minimize transaction costs. Such values as competitiveness and flexibility (i.e., freedom of contract) were selected as the guiding principles of the companies act, with the corporate friendly DGCL implicitly used as the model.[19] On

[14] *Ehdotus uudeksi osakeyhtiölaiksi. Osakeyhtiölakikomitean mietintö ja Pohjoismaiset rinnakkaisehdotukset*. KM 1969: A 20 p. 45 (Official legal report concerning the Finnish Companies Act of 1978).
[15] After lengthy negotiations between the Nordic countries, nearly identical bills were submitted to their legislatures, yet the "appetite for Nordic economic co-ordination" had substantially weakened by this time. Lekvall 2013 p. 38.
[16] However, in the European Commission's Action Plan on company law and corporate governance, adopted in December 2012, the need to codify European company law has been emphasized.
[17] See FCA Chapter 1, Section 1.
[18] See especially *Osakeyhtiölain uudistaminen – Tavoitteena kilpailukykyisempi yhtiöoikeus*. 21.8.2000 (memorandum given by the Ministry of Justice, Finland concerning the FCA, later "*Memorandum* 2000"). See also Mähönen, Jukka & Villa, Seppo: Osakeyhtiö I. Yleiset opit. WSOYpro 2006 p. 3.
[19] See HE 109/2005 Eduskunnalle uudeksi osakeyhtiölainsäädännöksi (governmental bill concerning the FCA, later "HE 109/2005") p. 16. See also Airaksinen, Manne: Onnistuiko vuoden 2006 osakeyhtiölakiuudistus? Defensor Legis 2013 pp. 443–460, pp. 444–445.

an ideological level, this meant a huge leap from a "traditional" stakeholder-oriented regulatory model towards a "modern" shareholder-oriented model.[20]

Now the key questions are *why the traditional regulatory model was replaced by the Anglo-American model* and *what the consequences of this replacement were.* The first issue is addressed below and the second is discussed later in Section 3.

When addressing the question of why the traditional regulatory model was replaced by the Anglo-American model, it is first important to point out that Finland had suffered a deep economic recession in the early 1990s. By the time the drafting of the FCA began (in the late 1990s, early 2000s) Finland's economy was, however, experiencing rapid growth, and consequently profitability, efficiency and competitiveness had once again emerged as key priorities in politics and law-making.[21] Moreover, such factors as membership of the EU and the euro area, significant changes in Finland's capital markets (especially liberation from a bank-centered financial system) and new tax laws made it seem inevitable that company law should be brought into the 21st century. Hence, the interests of Finnish company law specialists turned towards the dynamic DGCL, which was considered supreme in terms of economic efficiency[22] – and Finland, of course, wanted to join the EU-wide regulatory competition[23] known as the "race to the bottom (or top)."[24]

[20] These models have been explained by, e.g., Hansmann & Kraakman 2001 pp. 440–449.
[21] It was, in fact, a conscious decision to draft and pass the bill concerning the FCA during a stable period in the Finnish economy. Airaksinen 2013 p. 444.
[22] See, e.g., Romano, Roberta: *The Genius of American Corporate Law*. The AEI Press 1993.
[23] Although regulatory competition is usually associated with the phenomenon of U.S. states competing with one another for the most business-attractive legislation, similar competition between the EU Member States has also occurred. Within the EU regime, such competition in company law has been facilitated by the decisions of the European Court of Justice. This race to the bottom/top has, however, not been as rigorous as the ongoing regulatory competition in the U.S. See, e.g., Armour, John, Hansmann, Henry &Kraakman, Reiner: What is Corporate Law? In Kraakman et.al. (eds.): *The Anatomy of Corporate Law. A Comparative and Functional Approach*. Second Edition. Oxford University Press 2009 pp. 1–34, p. 34 and Sjåfjell, Beate: Towards a *Sustainable European Company Law. A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case*. Wolters Kluwer 2009 pp. 156–157 and pp. 258–262.
[24] The race to the bottom is a phrase used to describe the deregulation of the business environment in order to attract economic activities within the jurisdiction. In American company law, the race to the bottom has been seen as competition among the states for a legal structure that benefits managers at the expense of shareholders. The concept of a race to the top, on the other hand, has been used to describe competition for an efficient, shareholder-oriented regulatory framework. Whether the so-called Delaware phenomenon (U.S. companies incorporating in the State of Delaware) is a race to the bottom or a race to the top, is a much debated issue, and it cannot be addressed further here. See, e.g., Bainbridge, Stephen M.: *Corporation Law and Economics*. Foundation Press 2002 pp. 14–16, who summarizes the ongoing discussion on the phenomenon of the race to the bottom/top.

Another phenomenon which facilitated the Americanization of Finnish company law was the fact that Finnish legal scholars were late-bloomers in law and economics.[25] The golden days of law and economics in Finland date back to the late 1990s and early 2000s, when prominent scholars published several monographs and articles on the economic dimensions of company law. In fact, in 1994 Professor Matti J. Sillanpää was the first Finnish scholar to defend a doctoral thesis which can be defined (at least partially) as a law and economics study.[26] Besides Sillanpää, Professors Jukka Mähönen and Seppo Villa and Docents Timo Kaisanlahti and Pekka Timonen as well as the then Director of Legislative Affairs, Manne Airaksinen, (today Attorney-at-law) were particularly important promoters of the law and economics movement in Finland.

The impact of law and economics theory on Finnish company law doctrine was very strong. In fact, alternative approaches were rather systematically ignored and eventually forgotten.[27] Even the first comprehensive study on the general principles of company law was built firmly on the law and economics view of the company.[28] Taking into account these factors – and the fact that jurisprudence has always played an important role in Finnish lawmaking – it was no surprise that the FCA was also founded on a new ideology.[29]

Furthermore, it is likely that the fragmentation of the Nordic company law tradition played an important role in the Americanization of the FCA. This deterioration began after the failure to unify Nordic companies acts in the 1960s and 1970s. Furthermore, the Europeanization of domestic company laws also loosened normative ties between the Nordic countries. Hence, on an ideological level, the so-called path dependence effect did not prevent Finland from departing from the prevailing juridical tradition.[30]

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[25] However, the rest of Continental Europe has also been lagging behind the U.S. in terms of the development of law and economics. See, e.g., Gelter, Martin & Grechenig, Kristoffel: History of Law and Economics. *Preprints of the Max Planck Institute for research on Collective Goods* 2014/5.

[26] Sillanpää, Matti J.: *Julkisesta ostotarjouksesta. Arvopaperimarkkinaoikeudellinen tutkimus*. Jyväskylä 1994.

[27] E.g., Docent Heikki Toiviainen built his arguments on a "normative social theory". See Toiviainen, Heikki: *Osakeyhtiön toimitusjohtajan asema. Oikeusdogmaattinen tutkimus vallasta ja sen sääntelystä*. Lakimiesliiton kustannus 1992. This new approach was, however, rejected by other company law scholars.

[28] Mähönen & Villa 2006. See also Timonen, Pekka: *Määräysvalta, hinta ja markkinavoima. Julkisesti noteeratun yrityksen määräysvallan siirtymisen oikeudellinen sääntely*. Lakimiesliiton kustannus 1997 pp. 134–179.

[29] See also The European Model Company Act (EMCA) 2015 pp. 11–12: "Over the last decade or two there has been a paradigm shift in European company law. In short, the aim of company legislation/regulation has shifted from being exclusively shareholder and creditor protection to including promotion of economic efficiency. The latter is reflected primarily, but not exclusively, in the maximization of profits for shareholders. Use of economic theory and law and economic studies have become a natural part of the development of company regulation particularly in the areas of corporate governance, financing companies and takeovers."

[30] Also, e.g., Denmark has adjusted its company legislation to follow such trends as international regulatory competition, economic efficiency and flexibility. See Krüger Andersen, Paul & Sørensen, Evelyne J.B.: *The Danish Companies Act. A Modern and Competitive European Law*. Djøf Publishing 2013 p. 23.

3 Consequences of the Americanization of the FCA

When assessing the consequences of the Americanization of the FCA, one must start by making two important observations. First, the ideological leap from a stakeholder-oriented regulatory model towards a shareholder-oriented model did not result in the law being completely revised. Although the FCA was built on a different regulatory model from its predecessor, many legal provisions remained untouched or were merely updated to meet present day requirements. Second, it is important to emphasize that the consequences of the Americanization of the FCA – i.e., the pros and cons of the convergence – are hard to test empirically, although empirical knowledge on this matter can be gained by mere observation. In Finland this knowledge has been recently gathered by the Ministry of Justice,[31] and also the Finnish Corporate Law Association has comprehensively assessed the strengths and weaknesses of the FCA.[32] Furthermore, case law concerning the FCA brings out some of the problems concerning legal transplants.

Maybe the most significant effect of the Americanization of the FCA was deregulation: On one hand, the number of mandatory rules and formalities was decreased, and, on the other, the general principles of company law were given more weight.[33] In practice, this meant that the flexibility (i.e., freedom of contract) of the law was increased to promote efficiency. Besides efficiency, the deregulation of company law was supported by a strong belief in the sustainability of informal institutions in Finnish society:[34] If these institutions are strong and reliable, laws (i.e., formal institutions) do not have to be as defensive (casuistic and mandatory) as in societies where informal institutions are weak and unreliable.[35]

[31] See Osakeyhtiölain muutostarve. Arviomuistio 20/2016 (later "MOJ 20/2016").
[32] Kellas, Sebastian & Vesa, Rasinaho: Uuden osakeyhtiölain puutteita ja kehittämistarpeita. *Tilintarkastus – Revision* 05/2008 pp. 17–21.
[33] HE 109/2005 p. 17.
[34] See, e.g., North, Douglass *C.*: *Institutions, Institutional Change and Economic Performance*. Cambridge 1990 p. 4 who has separated "formal institutions" from "informal institutions."
[35] Villa, Seppo: *Velkojan asema osakeyhtiössä*. Talentum 2003 p. 23.

Especially when the FCA came into force in 2006, some legal scholars believed that deregulation would significantly erode the protection of the minority shareholders and creditors of Finnish companies[36] – although there has been no subsequent evidence that such deterioration has occurred.[37] In fact, the above mentioned data gathered by the Ministry of Justice show that today the majority of legal practitioners and scholars would like the FCA to be even more liberal than is currently the case. Especially in small and medium sized enterprises (later SMEs), the protection of minority shareholders and creditors is usually achieved by contractual arrangements – such as shareholders' agreements – thus the protection provided by the FCA is considered somewhat inconsequential.[38] Nevertheless, limited access to information on the actions of company directors has been recognized as an actual fault in the legislation.[39] Especially in SMEs and in companies where the state is a significant or majority shareholder (some of which have previously been public utilities), the law should provide all shareholders with extensive information rights unless there is the risk of substantial harm to the company.[40]

Deregulation has, of course, many disadvantages, and some Anglo-American transplants have been met with skepticism by legal practitioners and scholars as well as entrepreneurs and investors. This is illustrated by the following four examples:

1. The implementation of the strict shareholder-oriented model has attracted criticism.[41] According to Chapter 1, Section 5 of the FCA, "[t]he purpose of a company is to generate profits for the shareholders, unless otherwise provided in the Articles of Association." This so-called shareholder primacy rule means that company directors should promote the interests of shareholders rather than those of other stakeholders, such as creditors, employees and customers. Although supporters of the so-called enlightened value maximization theory – which is the prevailing theory in Finland[42] – claim that by promoting the interests of the shareholders' "going concern" the interests of other stakeholders are

[36] See, e.g., af Schultén, Gerhard: Innehåller nya aktiebolagslagens stadganden för mycket dispositiva regel? *Tidskrift utgiven av Juridiska Föreningen i Finland* 2006 pp. 309–318 and Toiviainen, Heikki: Suomen uusi osakeyhtiölaki: Kilpailukykyinen osakeyhtiölainsäädäntö 2000-luvun yrityksille 1800-luvun sääntelyllä? In Kolehmainen, Esa (ed.): *Business Law Forum 2006*. Helsinki 2006 pp. 25–67.
[37] *Airaksinen* 2013 pp. 453–454.
[38] See, e.g., FitzGeralf, Sean & Muth, Graham: *Shareholders' Agreements*. Sixth Edition. Sweet & Maxwell 2012 pp. 27–28.
[39] Pönkä, Ville: *Yhdenvertaisuus osakeyhtiössä*. SanomaPro 2012 pp. 177–178.
[40] Andersson, Jan: Minority shareholder protection in SMEs: a question of information *ex post* and bargaining power *ex ante*? In Mette Neville & Engsig Sørensen, Karsten (eds.): *Company Law and SMEs*. Copenhagen 2010 pp. 191–206, pp. 192–193. See also MOJ 20/2016 pp. 29–30.
[41] See, e.g., Toiviainen 2006.
[42] Pönkä, Ville: Yhtiön etu – Osakeyhtiöoikeudellinen näkökulma I. *Lakimies* 1/2013 pp. 2–34.

concurrently satisfied, there also seems to be a strong belief that company directors should have fiduciary duties to wider society rather than solely to their shareholders.[43] Today, virtually all Western jurisdictions provide entrepreneurs with the possibility of incorporating as non-profit, benefit or flexible purpose companies, thus the essential question is whether the directors of "traditional" pro-profit companies should prioritize (and to what extent) social benefit objectives over profitability.

At the end of the day, however, the shareholder-stakeholder primacy debate seems to be a topic to which company law has little to contribute. As Michael C. Jensen states, a

> [m]ultiple objective is no objective. It is logically impossible to maximize in more than one dimension at the same time unless the dimensions are what are known as "monotonic transformations" of one another. … The result will be confusion and lack of purpose that will fundamentally handicap the firm in its competition for survival.[44]

In other words, company directors must be provided with a specific objective, and the content of that objective is a matter of politics not legal dogmatics. Therefore, the question of whether the shareholder-oriented model is better than some alternative model is not addressed further here.

2. According to Chapter 1, Section 8 of the FCA, "[t]he management of the company shall act with due care and promote the interests of the company." In suits alleging that company directors have violated this duty of care, courts evaluate the case according to a so-called business judgment rule (*liiketoimintapäätösperiaate*). The business judgment rule holds that a court should not enjoin or set aside a business decision made by a company's directors or hold them liable for the damages caused by such decision as long as an informed and rational basis for the decision can be demonstrated.[45] This rule has evolved in Delaware court practice, and Finnish company law scholars claim that a (nearly) identical rule exists in Finland.[46]

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[43] See, e.g., Sjåfjell, Beate & Mähönen, Jukka – Upgrading the Nordic Corporate Governance Model for Sustainable Companies. *European Company Law* 11, no. 2 (2014) pp. 58–62, p. 59 – who have claimed that Nordic companies acts should include the statement that "(t)he purpose of a company is to create sustainable value through the balancing of the interests of its investors and other involved parties within the planetary boundaries"

[44] Jensen, Michael C.: Value maximization, stakeholder theory and the corporate objective function. *Journal of Applied Corporate Finance* 2001 pp. 8–21, pp. 10–11.

[45] See, e.g., Johnston, E. Ashton: Defenders of the Corporate Bastion in Revlon Zone: Paramount Communications Inc. v. Time Inc. *Catholic University Law Review* 1990 pp. 155–187, p. 155.

[46] In fact, Mähönen and Villa as well as Dr. Marika Salo go even further and claim that U.S. law should be taken into account when interpreting the Finnish version of the business judgment rule. Mähönen, Jukka & Villa, Seppo: *Osakeyhtiö I. Yleiset opit*. Talentum 2015 p. 61 and Salo, Marika: *Hyvä liiketoimintapäätös ja johdon vastuu*. Talentum 2015 p. 43 and pp. 45–49. See also Krüger Andersen & Sørensen 2013 p. 213: In the USA, courts invoke the "business judgment

Stephen M. Bainbridge has argued that "the business judgment rule is designed to effect a compromise – on a case-by-case basis – between two competing values: authority and accountability."[47] In other words, the business judgment rule can be understood as a balance between the directors' decision-making discretion and the need to hold directors responsible for their actions.[48] The obvious problem with this kind of a rule is that it does not really tell us anything about the degree of care and skill shareholders are entitled to expect from their "agents", i.e., company directors. In Finland, where there is hardly any case law on director liability, shareholders are in an extremely vulnerable position if their protection against managerial negligence and opportunism is based primarily on an "empty" transplant-rule. Therefore, the adoption of the American (or Delawarean) business judgment rule can be soundly criticized,[49] especially given that it has also received substantial criticism in the U.S.[50]

3. Attitudes towards shareholder liability (i.e., shareholders being held personally liable for the undertakings of the company) have traditionally been negative within Nordic regimes.[51] In fact, before 2015 the principle of limited liability had never been breached in Finnish court practice. However, in case KKO 2015:17, the Supreme Court of Finland found a Finnish listed company liable for the actions of its wholly owned Estonian subsidiary, which the parent company had used to evade obligations included in the Finnish Copy Right Act (404/1961). With this decision the Supreme Court adopted the doctrine of piercing (or lifting) the corporate veil, which is a clear step towards the Anglo-American company law tradition.[52]

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rule" when assessing the conduct of directors and determining whether to impose liability in a particular case. … This rule is widely recognized; also in Denmark."

[47] Bainbridge, Stephen M.: The Business Judgment Rule as Abstention Doctrine. *UCLA Research Paper No. 03*-18 p. 2. See also Bainbridge, Stephen M.: *The New Corporate Governance in Theory and Practice*. Oxford University Press 2008 pp. 107–108.

[48] In addition, the business judgment rule has been seen as an "immunity doctrine" from the perspective company directors. McMillan, Lori: The Business Judgment Rule as an Immunity Doctrine. *William & Mary Business Law Review* 2013 pp. 521–574. See, similarly, Macey, Jonathan R.: *Corporate Governance. Promises Kept, Promises Broken*. Princeton University Press 2008 p. 38.

[49] It is, however, necessary to emphasize that Finnish legal scholars, at least, have not managed to create a better alternative to the Anglo-American business judgment rule. See especially Salo 2015.

[50] See, e.g., Greenfield, Kent: *The Failure of Corporate Law. Fundamental Flaws and Progressive Possibilities*. The University of Chicago Press 2006 p. 218 and Lyman, Johnson: The Unnecessary Business Judgment Rule. *Columbia Law School's Blog on Corporations and the Capital Markets* 10.7.2013.

[51] Pönkä 2012 pp. 28–30.

[52] Although piercing the corporate veil is traditionally considered a "national problem," the U.S. can be considered the birthplace of veil-piercing jurisprudence. See, e.g., Vandekerckhove, Karen: Piercing the Corporate Veil. *European Company Law 4*:2007 pp. 191–200, p. 191. In other common law jurisdictions, such as the U.K., the doctrine of lifting the veil plays a relatively small role. See, e.g., Davies, Paul L.: *Gower and Davies' Principles of Modern Company Law*. Sweet & Maxwell 2008 pp. 208–209.

Although the decision of the Supreme Court is soundly reasoned[53] – it was evident that the respondent had abused the protection of limited liability – it is both theoretically and practically problematic.[54] First, according to Chapter 1, Section 2.2 of the FCA, "[t]he shareholders shall have no personal liability for the obligations of the company." Therefore, the Supreme Court's decision is *contra legem* and based solely on an unwritten prohibition against the abuse of rights. Especially in a civil law jurisdiction like Finland, it is highly exceptional for a court, even a supreme court, to form (or adopt) legal rules which conflict with the explicit rules of written law: Finnish courts do not – and should not – develop law in a similar manner to courts in a common law system (e.g., the Delaware Court of Chancery).

Second, it is anything but self-evident that Finnish company law doctrine should provide the possibility of piercing the corporate veil. Although there are situations – as shown by KKO 2015:17 – where shareholders are capable of abusing the protection of limited liability, there are other mechanisms which can be utilized to prevent such shareholder opportunism.[55] As David Millon has demonstrated, case law concerning the doctrine of veil-piercing is notoriously incoherent,[56] and some have even argued that the outcome of a trial "is dependent on the particular judge and what the judge has had for breakfast!"[57] In other words the possibility of piercing the corporate veil undermines legal certainty in company law matters and opens the door to fraudulent suits – which is just what has happened in the U.S. and the U.K. Therefore, the veil-piercing doctrine should thus be seen a Pandora's Box which should not be imprudently opened.[58]

4. Company law is based on the idea that since shareholders are the company's residual risk bearers, they are the most motivated of all the stakeholders to promote the company's interests: Shareholders only receive what is left after the claims of the other interest groups (creditors, employees, customers etc.) have been satisfied. Therefore, the control rights of the company should be in the hands of shareholders and the managers they have selected.[59]

[53] See, e.g., Villa, Seppo: Samastaminen: KKO 2015:17. *Lakimies* 2016 pp. 533–542
[54] MOJ 20/2016 p. 34.
[55] Pönkä 2012 pp. 29–30.
[56] Millon, David: Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability. *Emory Law Journal* 2007, s. 1305–1382.
[57] Bourne, Nicholas: *Bourne on Company Law.* 4th edition. Abingdon 2008 p. 17.
[58] At least at present it seems that a veil-piercing statute will not be included in the FCA. MOJ 20/2016 p. 34.
[59] See, e.g., Hansmann & Kraakman 2001 p. 441.

A similar line of thought applies when determining how decision-making rights between shareholders should be divided. The capitalistic nature of the company is crystallized in the presumption that the person who invests the most capital should also have the most to say in company matters; i.e., instead of utilizing the so-called one man, one vote principle, modern pro-profit companies utilize the one share, one vote principle: The number of votes a shareholder possesses is determined by how many shares she/he holds, unless otherwise stipulated in the articles of association.[60]

In EU company law, the connection between share capital and shares is currently unbreakable. According to Article 8 of the Second Company Law Directive,[61] "[s]hares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par." In other words, public companies established within the EU regime may not issue shares with no reference to either nominal value or fractional ("par") value. Although the necessity for this rule is a highly debatable,[62] it is nevertheless compulsory law for the EU Member States.

On the other hand, for decades U.S. states – beginning with the State of New York – have allowed companies to issue "non-par value stock,"[63] i.e., shares with no nominal or fractional value. Initially, this caused some practical difficulties, but today problems related to non-par value shares are relatively rare.[64]

Of these two models (the EU model and the U.S. model), Finland has adopted the latter, even though it was acknowledged that the Second Company Law Directive does not permit non-nominal and non-par value shares.[65] In Finnish jurisprudence this regulatory decision has received some criticism, although it has been simultaneously acknowledged that Finnish legislators have not compromised the main objectives of the Second Company Law Directive by implementing the U.S. model.[66] Foreign

[60] In national legislation there are, of course, many exceptions to this principle. E.g., the FCA gives companies almost limitless freedom to issue non-voting shares as well as multiple voting shares (FCA Chapter 3, Sections 3–4).
[61] Second Council Directive (77/91/EC) of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.
[62] See e.g., High Level Group 2002 p. 82–83.
[63] See e.g., Airaksinen, Manne: Osakeyhtiölakityöryhmän aitoon nimellisarvottomuuteen perustuvaa pääomajärjestelmää koskevat ehdotukset. *Lakimies* 2003 pp. 944–966, p. 963 and Berle, Adolf A. & Means, Gardiner C.: *The Modern Corporation and Private Property*. 11th printing. New York 2010 p. 133. E.g., according to DGCL Section 152, shares to be issued by a company "shall be paid in such form and in such manner as the board of directors shall determine. The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof."
[64] Clark, Robert Charles. *Corporate Law*. 12th printing. Aspen Law & Business 1986
[65] Airaksinen 2003 pp. 964–965 and HE 109/2005 p. 22.
[66] Laine, Juhani: *Maksuton osake*. Talentum 2016 p. 131 and 133.

company law experts do not, however, regard this as an acceptable justification for the breach of the explicit wording of Article 8.[67] It also seems that EU company law is not yet ready to take a step towards the American model by discarding the futile requirements of nominal value and par value shares.[68] This does, of course, not mean that the European model is better than the alternative, and in fact, Finnish experiences of the non-nominal and non-par value system have been mainly positive.[69] Today it is, in fact, extremely rare for companies to provide shares with a nominal value in the company articles of association.

4 Final thoughts

In this article the so-called Americanization of European company law has been assessed from the perspective of the FCA. As demonstrated above, there has been an ideological and normative shift from the French-German company law tradition towards the Anglo-American tradition. Along with this shift, Finland adopted several transplants from U.S. (or Delawarean) law, and in Section 3 it was claimed that some of these transplants are – to say the least – problematic. However, during the past ten years that the FCA has been in force, there have been no signs of a so-called "transplant-shock."[70] In fact, data gathered by the Ministry of Justice and the Finnish Corporate Law Association indicate that the law has functioned relatively well.[71] This, of course, does not mean that the current regulatory framework for Finnish companies is perfect, and it remains to be seen, for example, how the Anglo-American business judgment rule and the veil-piercing doctrine will evolve in case law.

There is empirical evidence that, to some extent, most Western jurisdictions have adopted elements of the "now-global norms of good corporate governance."[72] The question of the extent to which company law has converged (or should converge) – as well as the final form of that convergence – is ultimately a subject on which "reasonable minds" can differ.[73] Therefore, it is impossible to make precise predictions on the future evolution of European (and Finnish) company law. In Finnish jurisprudence, Veikko Vahtera has argued that (company) regulation has a "local optimum," and when

[67] See, e.g., Sillanpää, Matti J.: European Model Companies Act – EMCA. *Defensor Legis* 2013 pp. 621–625, p. 625.
[68] *Ibid.*
[69] *Airaksinen* 2013 pp. 454–455.
[70] Stout, Lynn A.: On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures. In Milhaupt, Curtis J. (ed.): *Global Markets, Domestic Institutions. Corporate Law and Governance in a New Era of Cross-Border Deals*. Columbia University Press 2003 pp. 46–76, p. 47.
[71] See also Airaksinen 2013 pp. 457–460.
[72] See, e.g., Enriques, Luca, Hansmann, Henry & Kraakman, Reiner: The Basic Governance Structure: The Interests of Shareholders as a Class. In Kraakman et.al. (eds.): *The Anatomy of Corporate Law. A Comparative and Functional Approach.* Second Edition. Oxford University Press 2009 pp. 55–87, p. 82.
[73] Armour , Hansmann & Kraakman 2009 p. 5.

this optimum is reached the process of convergence will come to an end.[74] Taking into account such projects as the European Model Company Act (EMCA), it seems likely that at least the convergence of European company law will continue for the foreseeable future.

[74] Vahtera, Veikko: Yhtiöoikeudellisen sääntelyn lokaalisuuden vaikutus sääntelyn pakottavuuteen ja sopimusvapauteen. *Lakimies* 2/2010 pp. 160–175, p. 164.